90-1834 (1)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October 1990 Term

No. _____

GEORGE WADE, et ux.,
-v-
NEIL E. SHOOK, TRUSTEE,
etc. et al.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Submitted By:

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QUESTION PRESENTED

Does the U.S. Seventh Circuit Court of Appeals have jurisdiction over a timely filed appeal of an Order of the District Court denying a post-judgment motion filed pursuant to Federal Rule of Civil Procedure 60?

LIST OF PARTIES

Pursuant to Rule 21.1(b), the parties who have appeared in the appeal case no. 90-1854 are listed below:

APPELLANTS: George and Joyce Wade
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APPELLEES: Merchants National Bank and Trust Company of Indianapolis
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INDEX

	Page
Question Presented.....	i
List of parties.....	ii
Opinions Below.....	1
Jurisdiction.....	2
Statute Involved.....	2
Statement of Case.....	3-18
Reasons for Granting Writ...	18-26
Conclusion.....	27
Proof of Service.....	28
Appendix A- Order of U.S. Court of Appeals for 7th Cir. Dated 02/04/91 entered in appeal case no.90-1854...	29
Order of U.S. District Court for Southern District of Indiana Dated 04/10/90 entered in case no.IP88-1417-C.....	30-45
Appendix B- Title 28 U.S.C. §1291.....	46
Appendix C- Jurisdictional Statement from Debtors-Appellants' Brief filed 10/19/90 in appeal case no.90-1854.....	47-51
Statement of Case from Debtors-Appellants' Brief filed 10/19/90 in appeal case no.90-1854.....	51-52
Statement of Issues from Debtors-Appellants' Brief filed 10/19/90 in appeal case no. 90-1854.....	52-53

Issue Three and Argument
from debtors-Appellants'
Brief filed 10/19/90 in
appeal case no. 90-1854..... 53-74

Order of U.S. Court of
Appeals dated 11/19/90
entered in appeal case
no.90-1854..... 75-78

Portions of:
Appellants' Appendix Pursuant
to Federal Rule of Appellate
Procedure 30(a) filed 10/19/90
in appeal case no.90-1854--

Notice Regarding
Disqualification originally
filed 7/21/89 in bankruptcy
case no. IP88-1417-C..... 79-80

Paragraph 8 of Debtors'
Statement of Relevancy
originally filed 12/12/12
in bankruptcy case no.
IP88-1417-C..... 81-82

APPENDIX D-
Order of U.S. Court of
Appeals for 7th Cir.
Dated 02/04/91 entered
in appeal case no.90-1854... 83

APPENDIX E-
Cady, Richard E. "Bankruptcy
Investigation Targets Lawyers,
Judges." Indianapolis Star
27 Mar. 1988:1..... 84-88

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Ulyssus George and Joyce Wade, the Petitioners herein, pray that a writ of certiorari issue to review the final order of the U. S. Seventh Circuit Court of Appeals entered in the Bankruptcy of Ulyssus George and Joyce Wade and the U.G. Wade Trucking, Inc., in case no. 90-1854 on February 4, 1991 (Appendix A page 29, and Appendix D page 75).

OPINIONS BELOW

The opinion of the U.S. Seventh Circuit Court of Appeals is un-reported and is reproduced in the Appendix A hereto, infra, page 29. The order appealed from in the District Court is reproduced in the Appendix A hereto, infra, pages 30 to 45 .

JURISDICTION

The final order of the U.S. Seventh Circuit Court of Appeals was entered on February 4, 1991. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The Statute involved is 28 U.S.C. Section 1291 which provides that the courts of appeals shall have jurisdiction from all final decisions of the district courts of the United States.

STATEMENT OF THE CASE

The Petitioners filed two (2) Chapter 7 bankruptcy petitions on 12/30/85, in the U.S. Bankruptcy Court for the Southern District of Indiana pursuant to 11 U.S.C. §301. The bankruptcy petitions were captioned Ulyssus George and Joyce Wade and U.G. Wade Trucking, Inc. and assigned respective case numbers IP85-6002-B and IP85-6003-B. The bankruptcy petition of U.G. Wade Trucking, Inc. contained a Schedule B-1 listing $85,440.56 in accounts receivable owed to U.G. Wade Trucking,, Inc. ("Schedule B-1 Accounts"). The bankruptcy court appointed Edward B. Hopper, II ("Trustee Hopper"), as trustee to liquidate the bankruptcy estates.

The bankruptcy cases were consolidated by the bankruptcy court on 07/23/86 (hereinafter referred to as the "bankruptcy case"). In November, 1987, the bankruptcy court removed Trustee Hopper and appointed Successor Trustee Neil E. Shook. Trustee Shook is a respondent herein. On September 15, 1988, the bankruptcy case was withdrawn from the bankruptcy court to the U.S. District Court for the Southern District of Indiana, pursuant to 28 U.S.C. Section 157(d), and assigned Case No. IP88-1417-C in the district court.

In March of 1986, Trustee Hopper began communicating with the U.S. Attorney's Office for the Southern District of Indiana ("U.S. Attorney"), concerning allegations of criminal violations by Petitioners. On June 2,

1986, Trustee Hopper filed a Complaint to Deny Discharge ("Complaint") against the Petitioners and alleged criminal violations including perjury, bankruptcy fraud, and concealment of assets related to the Schedule B-1 Accounts. Trustee Hopper advised the U.S. Attorney of the Complaint. The U.S. Attorney in turn referred the Complaint to the Federal Bureau of Investigation, Indianapolis ("F.B.I."). The F.B.I. investigated the bankruptcy case.

The findings of the investigation conducted by the F.B.I. in connection with the Schedule B-1 Accounts were relevant to the issues to be decided by the district court prior to closing the bankruptcy case. The Petitioners made two (2) Requests for Information ("FOIA Requests"), pursuant to the Freedom of

Information Act (5 U.S.C. §552, et seq.), directed to the U.S. Attorney and the F.B.I., in order to gain access to the investigative files possessed by the F.B.I. and the U.S. Attorney.

The purpose of the FOIA Requests was to ascertain the disposition of the Schedule B-1 Accounts and their liquidation. The FOIA Request to the U.S. Attorney resulted in commencement of an adversary proceeding in the district court after withdrawal, which is now pending in the district court under Case No. IP89-771-C.

The district court set the final hearing in the bankruptcy case for January 4, 1990. On 12/12/89, the Petitioners filed the "Debtors' Statement of Relevancy" in the bankruptcy case in connection with the final hearing. The Statement of

Relevancy attached (a) Three (3) subpoenas duces tecum served to the U.S. Attorney, the F.B.I. and the Records Management Division of the F.B.I. located in Washington, D.C.; (b) The FOIA Request served to the F.B.I.; and (c) A letter informing the Petitioners as to the existence of the investigative file consisting of approximately 700 pages responsive to the respective FOIA Request. The subpoenas duces tecum requested identical information from the F.B.I. investigation relating to the Schedule B-1 Accounts. The district court failed to require production of any documents responsive to the subpoenas duces tecum.

The Petitioners also served subpoenas duces tecum to Trustee Hopper and to the attorneys employed by Trustee

Hopper, who were designated as the custodians of his records concerning the disposition and liquidation of the Schedule B-1 Accounts. The district court failed to require production of any documents responsive to either of the subpoenas duces tecum. Trustee Hopper's Final Report of his liquidation of the Schedule B-1 Accounts addressed only 3 of the 20 individual Schedule B-1 Accounts listed, and accounted for approximately $3,000.00 of the $85,440.56 listed. In the record of this bankruptcy case, Trustee Hopper did not report to nor address the district court concerning the other 17 Schedule B-1 Accounts, totalling approximately $82,000.00, despite the numerous petitions, motions and complaints for accountings filed by the Petitioners.

The Petitioners also served subpoenas duces tecum to Merchants National Bank & Trust Company of Indianapolis ("Merchants"), a Respondent herein, in connection with the final hearing. The subpoena duces tecum sought information concerning the Schedule B-1 Accounts and any actions by Merchants to solicit and collect the Schedule B-1 Accounts. The district court failed to require production of any documents responsive to the subpoena duces tecum. It should be noted that Merchants' solicitation and collection attempts constituted the grounds of relevancy stated in the "Debtors' Statement of Relevancy", supra. In October, 1988, Merchants responded to request for production of documents in a related civil rights action commenced by the Petitioners,

and alleged it had no documents relating to any solicitations or collections of Schedule B-1 Accounts. However, in September, 1989, Merchants produced a form letter where Merchants acted to solicit and collect the Schedule B-1 Accounts, and indicated that Merchants possessed and used a list of accounts receivable owed to U.G. Wade Trucking, Inc. to attempt collection of accounts receivable of U.G. Wade Trucking, Inc. Merchants has consistently denied that any collections were made as a result of the attempted collections.

After the final hearing, the district court issued "Entry For January 17, 1990" (hereinafter, "Final Entry"), distributing a sum to Merchants based an Amended Proof of Claim filed by Merchants in the bankruptcy court in October, 1989, on

the condition that Merchants did not previously collect any Schedule B-1 Accounts. The remainder of the bankruptcy estate was distributed to Trustee Hopper and Trustee Shook and counsel. Finding no further business to conduct, the district court ordered the bankruptcy case closed.

The docket of the district court reflects that the Final Entry was entered on February 5, 1990. On February 27, 1990, the Petitioners filed a motion pursuant to Federal Rule of Appellate Procedure 4(a)(5), with an affidavit of attorney advising the district court that Petitioners did not receive notice of the Final Entry until February 23, 1990. The motion pointed out that the 30 day appeal time had lapsed and prayed that the district court should re-enter the Final Entry to

avail the Petitioners their right to appeal.

On March 26, 1990, the Petitioners filed a motion for leave to file notice of appeal in the district court pursuant to Federal Rule of Appellate Procedure 4(a)(5).

On April 3, 1990, the Petitioners filed a motion pursuant to Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60 (hereinafter "Rule 60 Motion"). The Rule 60 Motion pointed out that the Final Entry was blatantly contrary to the Laws of the United States, and that there were circumstances prevalent on the record to suggest that the presiding judge failed to require production of any documents responsive to the subpoenas duces tecum served in connection with the final hearing in order to prevent evidence

of bankruptcy fraud from surfacing for the record.

The district court denied the three post-judgment motions filed by Petitioners with its combined Order of April 10, 1990 (hereinafter referred to as the "Order of April 10, 1990") in which the district court characterized the Rule 60 Motion as a Rule 59(e) motion (Appendix A pages 33-37). On April 13, 1990, the Petitioners filed Notice of Appeal to the U.S. Seventh Circuit Court of Appeals from the Order of April 10, 1990 (Appendix C page 50).

On October 19, 1990, the Petitioners filed "Debtors-Appellants' Brief" ("Appeal Brief"), with the U.S. Seventh Circuit Court of Appeals in this matter (Appendix C pages 47-74).

On November 19, 1990 the Seventh Circuit determined that the Petitioners' motion for leave to file notice of appeal was filed within the second thirty-day window for filing such motions under Federal Rule of Appellate Procedure 4(a)(5). In its finding of November 19, 1990, the Seventh Circuit computed the time from the date the Final Entry of the district court was entered on the docket rather than from the date of Final Entry, citing Alerte v. McGinnis, 898 F.2d. 69 (7th Cir. 1990)(Appendix D pages 76-77).

Thus,the U.S. Seventh Circuit Court of Appeals addressed the first two arguments raised by Petitioners' Appeal Brief concerning erroneous time computation.

On November 30, 1990, the district court ruled that there was no excusable neglect for granting Petitioners' motion for leave to file notice of appeal filed on March 26, 1990.

On February 4, 1991, the U.S. Seventh Circuit dismissed the appeal in an opinion stating it lack jurisdiction (APPENDIX A p. 29). The U.S. Seventh Circuit erred when it failed to recognize its jurisdiction over Issue Three articulated in the Petitioners' Appeal Brief (Appendix C pages 47-74) raising the issue of the abuse of discretion of the district court in denying a motion brought by Petitioners

pursuant to Federal Rule of Civil Procedure 60. The U.S. Seventh Circuit cited no authority for the proposition that it had no jurisdiction to review the abuse of discretion by a lower court in denial of a Rule 60 motion. That is because there is none.

The Appeal Brief pointed out at Issue Three that the district court abused its discretion in denying the Petitioners' Rule 60 Motion (Appendix C pages 47-74). The Appeal Brief cited Brennan v. Midwestern United Life, 450 F.2d. 999, 1003 (7th Cir.-1971). In Brennan, the U.S. Seventh Circuit established the "abuse of discretion" standard in reviewing lower courts' denial of motions for relief from judgments. Id. The reviewing court's function is not to determine whether the lower court was substantially correct in

entering judgment from which relief is sought, but is limited to deciding whether the lower court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner. Id. The U.S. Seventh Circuit failed to perform this function in the appeal.

It is clear that the district court's characterization of a motion delineated as a motion pursuant to Federal Rule of Civil Procedure 60 and Rule 9024 of the Bankruptcy Rules of Procedure as a "Rule 59(e)" motion was an abuse of discretion according to the standards articulated by the Supreme Court in Forman v. Davis, 371 U.S. 178, 9 L.Ed.2d. 222, 83 S.Ct. 227 (1962).

The jurisdiction of a court of appeals to review the denial of a motion under Federal Rule of Civil Procedure 60 is well established by the Supreme Court. Polites v. United States, 364 U.S. 426, 5L.Ed. 2d. 173, 81 S.Ct. 202 (1960); Browder v. Director of Department of Corrections, 434 U.S. 257 54 L.Ed.2d. 521, 98 S.Ct. 556 (1978), which cites Brennan v. Midwestern United Life, supra., at footnote 7.

REASONS FOR GRANTING WRIT

Trustee Hopper filed the Complaint to deny the Petitioners discharge in the bankruptcy case accusing them of egregious bankruptcy fraud relating to the Schedule B-1 Accounts.

Trustee Hopper re-directed the mail of Petitioners without notice to Petitioners. Trustee Hopper

appropriated the Petitioner's Veteran's Disability benefit from his bank account without notice to Petitioners. Trustee Hopper appropriated an automobile insurance refund premium of Petitioners without notice to Petitioners that their automobile insurance lapsed upon said refund. Trustee Hopper directed a thorough search of the Petitioners' home without a notice or application in the record of the bankruptcy or apparent authority of the bankruptcy court to do so.

The Petitioners have consistently alleged that Merchants, and others collected the Schedule B-1 Accounts immediately prior to and after the filing of the bankruptcy petitions, and have since concealed the collection of Schedule B-1 Accounts from the record with the complicity of Trustee Hopper.

The Petitioners have consistently alleged that Merchants was the "servicer" of a mortgage on the Petitioners' home for the Indiana Housing Finance Authority, the true mortgage holder and lender. In March, 1986, Trustee Hopper and Merchants made a joint motion in the bankruptcy court to abandon the estate's interest in the home on the grounds that it was of inconsequential value to the estate and that Merchants holds a mortgage on the home. The Petitioners have consistently alleged that Merchants submitted a fraudulently altered mortgage document in a state court foreclosure action, and as a result of this activity, the Petitioners were deprived of their right to reaffirm their home with the true mortgage holder. The activities of Trustee Hopper and Merchants and the

facts and circumstances in this bankruptcy case would shock the conscience of the objective disinterested observer. Kinsella v. United States, 361 U.S. 234, 4 L.Ed.2d. 268, 80 S.Ct. 297.

There has been a great amount of acrimonious allegations by all parties. However, the means within which to ascertain the truth of the matters asserted was always within the reach of the district court. On July 20, 1989, the U.S. Attorney filed "Notice of Prior Pendency of Related Investigatory Matter" in this bankruptcy case, serving to notice the then presiding district court judge, the Honorable John Daniel Tinder, that during his former tenure as U.S. Attorney, a federal investigation was conducted.

On July 21, 1989, upon his recusal, Judge Tinder articulated the relevance of the federal investigation to the issues to be decided before the closing of the bankruptcy case.[1]

1/ "In determining whether recusal must occur here, I will presume that the nature of the matter investigated by the F.B.I. in consultation with the United States Attorney's office relates to some, if not all, of numerous matters of wrongdoing alleged by the debtors and others in a multitude of pleadings in this bankruptcy proceeding, or in one or more of the many related proceedings. Broad ranging allegations of bankruptcy fraud and other criminal wrongdoing have been asserted at various time in this proceeding and in related proceedings. These allegations of wrongdoing relate to virtually every aspect of the bankruptcy, including events occurring before the filing of the bankruptcy petitions. These allegations are so comprehensive about matters related to the bankruptcy, it would be inconceivable that these assertions would be unrelated to the matter examined by the F.B.I. In any event, I think it is fair to assume that any matter investigated in connection with this bankruptcy would be related to the issues yet to be decided herein." (Appendix C pages 79-80).

The opinion of Judge Tinder is accurate. In short, the F.B.I. traced the liquidation of the Schedule B-1 Accounts. The Petitioners' Statement of Relevancy explained the relevance of the information sought by the subpoenas duces tecum served to the U.S. Department of Justice for the final hearing.[2]

2/ "That based upon the volumn of records [700 pages] possessed by the FBI; the length of the FBI investigation of the debtors' title 11 U.S.C. proceedings; and the implied nature of the investigation [concealment of bankruptcy assets], there exists reasonable grounds for believing that the records possessed by the FBI contain specific information that confirms or evidences the debtors' allegation that Merchants solicited and collected approximately $23,000 in accounts receivable as articulated in paragraph (6) of this statement. Accordingly, if such information in fact exists and is produced by the FBI per SUBPOENA, the Application by Merchants and the Trustee would be denied by the court on prima facie grounds that Merchants is not entitled to the distribution. (Appendix C pages 81-82).

No party to this bankruptcy case has disputed or otherwise challenged the opinion of Judge Tinder or the Petitioners' Statement of Relevancy. Nevertheless, the district court disbursed the entirety of the bankruptcy estate to Merchants, Trustees and counsel, without requiring accountings of the Schedule B-1 Accounts or ordering from the U.S. Attorney and F.B.I. any relevant information concerning the Schedule B-1 Accounts and whence they went.

In this matter, the issue is the integrity of the United States and the U.S. Department of Justice. Sums certain were entrusted to the United States on Schedule B-1. The disposition of these sums was certainly determined by Trustee Hopper and the F.B.I. However this information is withheld from the record of this bankruptcy case.

The Petitioners are left to set sail in the sunset with demands from the Internal Revenue Service to pay taxes on income never realized while deprived of assets that should have paid these taxes under the normal operation of the Bankruptcy Code, Title 11 U.S.C.

The Supreme Court may take judicial notice of the systemic problems in the bankruptcy courts in assets cases where assets are entrusted to the bankruptcy courts. Problems in the U.S. Bankruptcy Court for the Southern District of Indiana are a matter of public attention and comment. See, Appendix E, article reported in the Indianapolis Star on March 27, 1988. The result of this federal investigation remains undisclosed to the public.

In its Order of February 4, 1991 denying review, the U.S. Seventh

Circuit denied jurisdiction over the abuse of discretion denying Petitioners' Rule 60 Motion contrary to Brennan v. Midwestern United Life, 450 F.2d. 999, 1003 (7th Cir.-1971).

The U.S. Seventh Circuit failed to perform its review function to determine whether the district court abused its discretion by denying the Rule 60 Motion. Consequently, the U.S. Seventh Circuit deprived the Petitioners due process to seek relief in a court of proper jurisdiction. Id.

The U.S. Seventh Circuit Court of Appeals far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED BY:

George Wade, Petitioner

Joyce Wade, Petitioner

PROOF OF SERVICE

The undersigned hereby affirms under penalty of perjury that the foregoing "Petition For Writ Of Certiorari" has been properly served on the attorneys listed below by first class, pre-paid United States mail on this 26th day of April, 1991, in compliance with Rule 28.3 of the Supreme Court Rules.

Service By:

George Wade

George Wade, pro se
Petitioner

to-

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN THE MATTER OF:)
)
GEORGE WADE, et al.,) Case No. 90-1854
Debtors-Appellants.)

February 4, 1991

On November 19, 1990, this court remanded this appeal to allow the district court to determine whether the appellants' late filing of their notice of appeal was due to excusable neglect under Federal Rule of Appellate Procedure 4(a)(5). The district court has now found no excusable neglect for the late filing. Accordingly, IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

The Bankruptcy Of	)	Bankr. Ct. No.
ULYSSUS GEORGE and	)	IP85-6003(B)
JOYCE WADE, U.G.	)	(consolidated)
WADE TRUCKING, INC.,	)	
	)	Dist. Ct. No.
Debtors.	)	IP88-1417-C

ORDER ON DEBTORS' MOTION TO ENTER BELATED MOTION TO CORRECT ERROR, ORDER ON MOTION FOR LEAVE TO FILE NOTICE OF APPEAL, ORDER ON SECOND MOTION TO CORRECT ERROR, and ORDER ON MOTION TO REOPEN

This bankruptcy proceeding comes before the Court on various motions of the debtors that have been filed since this case was closed. For the reasons set forth below, the Court DENIES the motion to file belated motion to correct error. As to the motion for leave to

file notice of appeal, the Court also DENIES the motion for the reason that the Court lacks jurisdiction to consider the motion. The Court also DENIES the second motion to correct error, but HOLDS IN ABEYANCE the motion to reopen.

I. Background:

This bankruptcy proceeding was withdrawn to the District Court and was eventually transferred to the undersigned along with several other related cases. On January 4 and 5, 1990, the Court heard evidence in support of and in opposition to various motions. On January17, 1990, the Court made its final order in this proceeding. The Court made it clear that all issues in the case were over. The Court stated that there was no further business to in the proceeding,

specifically ordered the proceeding to be closed, and twice specifically directed the Clerk to close the file.

Thus, under the holdings of In Re Kilgus, 811 F.2d. 1112, 1116 (7th Cir. 1987), and In Re Wagner, 808 F.2d. 542, 544-45 (7th Cir 1986), the order of January 17, 1990, was a final order from which appeal could be taken. The time for taking appeal began running at that point because the Court specifically made it clear that no business remained and that the case was closed. Debtors have not challenged this, and by their subsequent actions have implicitly acknowledged that this is so.

Unfortunately, counsel for the debtors did not receive a copy of the order. On February 22, 1990, more than a month after the final order was

entered, counsel learned of the order by hearsay and obtained a copy from the clerk of this Court on February 23, 1990. The present motion to file a belated motion to correct error was filed on February 27, 1990. An objection to the debtors motion was filed by Merchants Bank on March 8, 1990.

On March 26, 1989, the debtors then filed a notice of appeal. On April 3, 1990, the debtors then filed a second "Motion to Correct Error," along with a "Motion to Reopen." The Court will consider each motion separately below.

II. Discussion:

A. The Rule 59 Motions:

The debtors first ask the Court for "leave in which to file [their] belated

motion to correct error..."(Motion of Feb. 27, 1990, at 3) it is clear that the debtors are actually trying to file a Rule 59(e) motion to alter or amend a judgment. See Labuqen v. Carlin, 792 F.2d. 708, 709 (7th Cir. 1986); Marane, Inc. v. McDonald's Corp., 755 F.2d. 106, 110 (7th Cir. 1985)(motion to reconsider treated as a Rule 59 motion). Rule 59 motions must be served within ten days of the entry of judgment. The first issue in this setting, then, is whether this Court has the power to accept a "belated" Rule 59 motion.

This Court is unaware of any authority that allows the district courts to extend the ten-day time limit for filing Rule 59 motions. True, Rule 77(d) states that the time for appealing is not affected by the failure to receive notice of an entry except as

provided in Appellate Rule 4(a). However, Rule 77(d) does not indicate that the failure to receive an entry is grounds for extending the time limit of Rule 59.

To the contrary, Rule 6(b) specifically states that district courts cannot extend the time for taking any action under Rule 59(b), (d), and (e). Thus, as Rule 59 and Rule 6 make clear, "time to move under Rule 59...to alter or amend the judgment may not be enlarged..." 4A C. Wright and Miller, Federal Practice and Procedure §1167 at 495 (2ed. 1987). see also 11 Wright and Miller, Federal Practice and Procedure §2812; Practitioners' Handbook for Appeals to the Seventh Circuit, 21 (1990)(district court cannot extend time for a Rule 59 motion).

The Seventh Circuit has specifically

addressed this situation and has confirmed that where, as here, a party does not receive notice of the order and does not file a timely Rule 59(e) motion, the district court is without power to extend the time for filing such a motion. See Marane, Inc. v. McDonald's Corp, 755 F.2d. 106, 111 (7th Cir. 1985) See also Bernstein v. Lind-Waldlock & Co., 738 F.2d. 179, 182 (7th Cir. 1984)(time for filing a Rule 59(e) motion cannot be extended). Thus, the Court is powerless to grant the relief requested by the debtors.[1]

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1 Moreover, even if the Court were to reach the merits of the debtors' arguments, the Court would not amend its order. The arguments made today were previously asserted at the hearing and were rejected; the evidence and law were against the debtors. Moreover, this Court, acting as a bankruptcy court, is powerless to determine the res judicata effects of any decision made in this proceeding. American National Bank & Trust Co. v. City of Chicago, 636 F.Supp. 374, 381 (N.D. Ill. 1986); In Re Mandalay Shores Cooperative Housing Association, Inc., 63 B.R. 842, 852 (N.D. Ill. 1986). Thus, while the undersigned may

While this may appear to be a harsh rule, it must be remembered that Congress is not prevented from passing harsh laws. Such a rule certainly is not unconstitutional, and that is the only limit on Congress' discretion. In fact, the rule is well grounded in policy as it promotes the finality of judgments and forces parties to actively monitor their cases. In essence, the

---

eventually be asked to determine whether any decision made in this bankruptcy proceeding is res judicata as to an issue in another proceeding before the District Court, a prospective decision on that matter is not possible. The debtors were afforded more than a reasonable opportunity to litigate the issues presented in this particular proceeding, so if any res judicata effects flow from this bankruptcy proceeding (which seems unlikely at present), the debtors will have to accept the fact that they simply did not sustain their burden of proving their allegations.

Rule forces parties to check the docket for decisions approximately every two weeks (because the ten-day limit of Rule 59 is actually a longer limit than that under Rule 6(a)'s exclusion of weekends). That is a choice the Congress has seen fit to make, and this Court, bound to uphold the law, cannot second-guess that legislative action.

Accordingly, the motion to file belated motion to correct error is DENIED.[2] For the same reasons, the second "Motion to Correct Error" that was filed on April 3, 1990, must be DENIED.

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2 If the motion were instead construed to be a Rule 60 motion (which the Court does not do so in this instance), the result would be much the same. While such a Rule 60(b) motion would be timely, it would not affect the time for appeal. Moreover, the Court would deny such a motion on the merits in this case.

B. The Motion for Leave to File a Notice of Appeal:

On March 26, 1990, which was 69 days after the Court's order of January 17, 1990, as computed under Fed.R.App.P. 26(a), the debtors filed a motion for leave to file their notice of appeal. A notice of appeal must be filed within thirty days under Rule 4(a)(1). The debtors, though, correctly bring this to file a belated notice of appeal pursuant to Rule 4(a)(5) of the Rules of Appellate Procedure, which provides as follows:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). *** No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later. Fed.R.App.P. 4(a)(5)(emphasis added).

This subdivision of Appellate Rule 4(a) thus provides some leeway from the otherwise mandatory rule that appeals must be commence within 30 days of the final order. However, this narrow escape clause only allows a brief window for filing a belated notice of appeal, regardless of the reason for the delay. As Rule 77(d) of the Federal Rules of Civil Procedure makes clear, the failure to receive an order from the clerk's office does not affect the time for appeal except as specifically allowed under Rule 4(a). Thus, even where the aggrieved party does not receive a copy of the final order, the appeal cannot proceed if the time limitations of Rule 4(a)(5) are not followed.

Under Rule 4(a)(5), the motion to file a belated appeal may not be filed more than thirty days past the initial 30 day

deadline of Rule 4(a). The plain language of the makes this clear, and the Seventh Circuit has confirmed that a motion to file a notice of appeal that is not filed within 30 days after the original notice was due is untimely. See Labugen v. Carlin, 792 F.2d. 708, 709-10 (7th Cir. 1986); United States Ex Rel. Leonard v. O'Leary, 788 F2.d. 1238, 1239, (7th Cir. 1986).

In this case, then, the debtors were required to file their motion for extension to file a belated notice of appeal within 30 days of the date the notice of appeal was originally due under Rule 4(a). Thus, the motion for an extension was due within 60 days of the final order. Unfortunately, the debtors did not move for an extension of time to file their notice of appeal until 69 days after the final order.

Stated another way, the present motion came 39 days after the notice of appeal was due and 9 days after this motion for extension was due. Because the time limits of Appellate Rule 4(a)(5) are mandatory and jurisdictional, O'Leary, 788 F.2d. at 1249, and because those mandates were not met in this case, this Court is without power to allow a notice of appeal to be filed.

Again, while this Rule might at first glance seem harsh, Congress has found it appropriate to promote finality of judgments and place the burden on the parties to check the docket. The Rule recognizes that orders can and, unfortunately, sometimes do get lost in the shuffle; but the Rule removes this as an excuse after the 60th day from a final order. This allows prevailing parties to know to a certainty that the

final order cannot be disturbed, except for the narrow grounds enumerated in Fed.R.Civ.P. 60, where more than 60 days have passed since the trial court's final order. Any other rule would leave the finality of orders uncertain.

Thus, if the debtors had moved for an extension of time to file their notice of appeal within 60 days of the final order, which the record shows they had an opportunity to do, the Court would have been able to consider whether excusable neglect or good cause were present. However, because no such motion was timely filed, this Court is without power to address that issue. Accordingly, the debtors' motion for extension of time to appeal is DENIED for want of jurisdiction.

C. The "Motion to Reopen"

In their most recent motion, the debtors ask the Court to reopen this bankruptcy case pursuant to 11 U.S.C. §350. This section of the Bankruptcy Code provides that a bankruptcy case "may be reopened in the court in which such case was closed to administer assets, accord relief to the debtor, or for other cause." 11 U.S.C. §350(b). The debtors assert that they have shown cause to reopen the case, alleging that the Court made determinations "blatantly contrary to the laws of the United States" in its final order. Debtors further note that they did not receive the Court's final order from the Clerk's office.

Prior to ruling on this motion, the Court desires to have the benefit of advocacy on the issues raised. Accordingly, any interested party may

object to the motion by filing a memorandum in opposition to the motion by April 20, 1990. The debtors may thereafter file a reply by April 30, 1990.

IT IS SO ORDERED THIS 10th day of April, 1990.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX B

Title 28 U.S.C. Section 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN THE MATTER OF:)
)
GEORGE WADE, et al.,) Case No. 90-1854
Debtors-Appellants.)

DEBTORS-APPELLANTS' BRIEF
AND REQUIRED SHORT APPENDIX

Note: Portions of "Debtors-Appellants' Brief" ("Appeal Brief") filed with the U.S. Seventh Circuit Court of Appeals in case no. 90-1854 are omitted as unrelated to federal question. Related portions are set forth below-

JURISDICTIONAL STATEMENT (page 4-5 in Appeal Brief):

On 12/30/85, the Appellants (hereinafter the "Debtors"), filed two (2) bankruptcy Petitions pursuant to 11 U.S.C. §301 under Chapter 7, in the U.S. Bankruptcy Court for the Southern District of Indiana. These Petitions were captioned Ulyssus George and Joyce Wade and U.G. Wade Trucking, Inc., and

assigned respective case numbers IP85-6002-B and IP85-6003-B. The two bankruptcy cases were substantively consolidated by the bankruptcy court on 07/23/86, under case number IP85-6002-B(consolidated), under Rule 1015 of the Bankruptcy Rules.

On 09/13/88, the referenced bankruptcy case was withdrawn from the bankruptcy court to the U.S.District Court for the Southern District of Indiana under 28 U.S.C. §157(d). The basis for district court jurisdiction is 28 U.S.C. §157(d). The district court also had jurisdiction over the bankruptcy case under 28 U.S.C. §1334.

On 01/17/90, the district court made its final order in this bankruptcy case with the Entry for January 17, 1990, wherein the district court ordered this bankruptcy case closed. SHORT APPENDIX

p. 1-5. The Entry for January 17, 1990, however was not docketed until 02/05/90. See, Docket Sheets, APPENDIX p. 47.

Following the district court's Entry for January 17, 1990, the Debtors filed (1) Motion to Enter Belated Motion to Correct Error, pursuant to Federal Rule of Appellate Procedure 4(a)(5) on 02/27/90, SHORT APPENDIX p. 6-8 (2) Motion for Leave to File Notice of Appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(5), on 03/26/90, SHORT APPENDIX p. 9-10 (93) Motion to Correct Error, pursuant to Rule 60 Fed.R.Civ.P., on 4/03/90, SHORT APPENDIX p. 11-34 (collectively referred to as Debtors' "post-judgment motions").

On 04/10/90, the district court made its Order on Debtors' Motion to Enter Belated Motion to Correct Error, Order on Motion for Leave to File Notice

of Appeal, Order on Second Motion to, Correct Error, SHORT APPENDIX p. 35-42 (hereinafter referred to as the "Orders Appealed From"). In the Orders Appealed From, the district court denied the Debtors' post-judgment motions. On 04/13/90, the Debtors timely filed Notice of Appeal of the Orders Appealed From, SHORT APPENDIX p. 43 On 04/25/90, the Debtors filed Appellants' Jurisdictional Statement with this Circuit Court, SHORT APPENDIX p. 44-50. No responsive memorandum was received from the Appellees.

The basis of appellate jurisdiction is 28 U.S.C. §1291. The Orders Appealed From are final orders of the district court from which appeal may be taken. The Debtors timely filed their Notice of Appeal of the Orders Appealed From on 04/13/90. This action is for review of

the Orders Appealed From denying the Debtors' post-judgment motions. The Orders Appealed From decided that the Debtors' rights to appeal the Entry for January 17, 1990 were lost.

STATEMENT OF THE CASE (page 5-6 in Appeal Brief):

The Debtors, with this action, seek reinstatement of their rights to appeal the Entry for January 17, 1990. This is an action for review of the Orders Appealed From, entered 02/05/90. In the Orders Appealed From, the district court denied two of the Debtors' post-judgment motions whereby denying the Debtors of the right to appeal the Entry for January 17, 1990. The Debtors argue that the district court abused its discretion in finding that the Debtors

had lost such rights to appeal in that the district court erroneously computed time for purpose of post-judgment motions and appeal.

Secondly, the district court denied the Debtors Motion to Correct Error filed 04/03/90, pursuant to Rule 60 Fed.R.Civ.P. The Debtors argue that the district court abused its discretion with implicit findings that Rule 60 Motion did not show sufficient grounds for disturbing the finality of the Entry for January 17, 1990.

STATEMENT OF ISSUES (page 6 in Appeal Brief):

1. Whether the Orders Appealed From set forth an erroneous time computation.

2. Whether the Orders Appealed From constitute an abuse of discretion in

depriving review of the Entry for January 17, 1990.

3. Whether there existed prejudicial conduct by the presiding district court judge in preventing evidence of bankruptcy fraud from surfacing for the record.

4. Whether the presiding judge failed to afford constitutional due process rights to the Appellants.

5. Whether the Orders Appealed From contain findings and conclusions contrary to the evidence and unsupported by the evidence.

ISSUE THREE: ARGUMENT (pages 17-26 in Appeal Brief):

The Orders Appealed From denied the Debtors' MOTION TO CORRECT ERROR, filed 04/03/90, pursuant to Rule 9024 of the

Bankruptcy Rules making applicable Rule 60 F.R.Civ.P. ("Rule 60 Motion"). SHORT APPENDIX p.11-34 In the Orders Appealed From, the district court denied the Rule 60 Motion, by inference, with the following findings. (1) "Accordingly, the motion to file belated motion to correct error is DENIED. For the same reasons, the second "Motion to Correct Error" that was filed on April 3, 19990, must be DENIED." SHORT APPENDIX p. 39 (2) "[t]he evidence and law were against the debtors." SHORT APPENDIX p. 38 at footnote #1. (3) "The debtors were afforded more than a reasonable opportunity to litigate the issues presented in this particular proceeding." SHORT APPENDIX p. 38 at footnote #1 (4) "Moreover, the Court would deny such a motion on the merits in this case." SHORT APPENDIX p. 39 at footnote #2.

The debtors' general response to the foregoing findings reflected in the Orders Appealed From is simply that the district court has never reached the merits in this bankruptcy case. Likewise, the Debtors were not afforded a reasonable opportunity to litigate the issues in this bankruptcy case. Further, the evidence and law were not against the Debtors, the prejudice of the district court was against the Debtors.

This is an action for review of the Orders Appealed From, not the Entry for January 17, 1990. Accordingly, the Circuit Court's function in this appeal is not to determine whether the district court was substantially correct in entering the Entry for January 17, 19900. The Circuit Court's function in this appeal is to decide whether the

district court abused its discretion in ruling that the Debtors' Rule 60 Motion did not show sufficient grounds for disturbing the finality of the Entry for January 17, 1990, in a timely manner. Brennan v. Midwestern Life Insurance Co., 450 F.2d. 999, 1003 (7th Cir. 1971).

The Rule 60 Motion is re-alleged and incorporated by reference herein as if fully set forth in full. With notions of comity and economy, the Debtors refrain from bringing to issue in this appeal every relevant part of record made since this bankruptcy case was commenced nearly 5 years ago on 12/30/85. It is suffice to say that errors by the district court in the Entry for January 17, 1990 are set forth in the Debtors' Rule 60 Motion However, it is necessary for an adequate

understanding of Issue Three, that this Circuit Court be informed of at least part of that voluminous bankruptcy record which underlies the Rule 60 Motion.

The main point to Issue Three and the Rule 60 Motion is the investigation of this bankruptcy case by the F.B.I. in consultation with the U.S. Attorney ("federal investigation"). From the federal investigation, the F.B.I. possesses seven hundred (700) pages of investigative files. The U.S. Attorney possesses an unknown number of documents from the federal investigation. The federal investigation has been the subject of two (2) Request for Information made by the Debtors pursuant to the Freedom of Information Act (5 U.S.C. §552), directed to the F.B.I. and U.S. Attorney ("FOIA Request").

The findings of the federal investigation were related and relevant to issues to be decided by the district court prior to closing this bankruptcy case. On 07/20/89, the U.S. Attorney filed NOTICE OF PRIOR PENDENCY OF RELATED INVESTIGATORY MATTER in this bankruptcy, serving to notice the then presiding district court judge, the Honorable John Daniel Tinder, that while during his former tenure as U.S. Attorney, the federal investigation was conducted. APPENDIX p. 57-58

On 07/21/89, Judge Tinder recused himself from this bankruptcy case, and other related cases, with the NOTICE REGARDING DISQUALIFICATION APPENDIX p. 59-64. Upon his recusal, Judge Tinder put into perspective the relevance of the federal investigation to issues to be decided by the district court prior

to closing the bankruptcy case; to wit; "In determining whether recusal must occur here, I will presume that the nature of the matter investigated by the F.B.I. in consultation with the United States Attorney's office relates to some, if not all, of numerous matters of wrongdoing alleged by the debtors and others in a multitude of pleadings in this bankruptcy proceeding, or in one or more of the many related proceedings. Broad ranging allegations of bankruptcy fraud and other criminal wrongdoing have been asserted at various times in this proceeding and in related proceedings. These allegations of wrongdoing relate to virtually every aspect of the bankruptcy, including events occurring before the filing of the bankruptcy petitions. These allegations are so comprehensive about matters related to

the bankruptcy, it would be inconceivable that these assertions would be unrelated to the matter examined by the F.B.I. In any event, I think it is fair to assume that any matter investigated by the F.B.I. in connection with this bankruptcy would be related to the issues yet to be decided herein." APPENDIX p. 61.

The Honorable Larry J. McKinney was assigned as presiding judge over the bankruptcy case upon Judge Tinder's recusal, supra. Likewise, Judge McKinney also accepted assignment of a related case in which the Debtors were situated as plaintiffs and the United States Department of Justice as defendant (case number IP89-771-C) commenced as an adversary proceeding on 07/05/89 pursuant to 5 U.S.C. §552, et seq., and Rule 7001 of the Bankruptcy

Rules [in re; related appeal case no. 90-2193, now dismissed]. The basis for the related case was the FOIA Request, supra. In that related case, the Debtors as plaintiffs, sought to join the Records Management Division of the F.B.I. as a party defendant. The Debtors believed the proposed joinder was necessary because the investigative files compiled by the F.B.I. Indianapolis had been referred to Washington D.C. The joinder was denied by Judge McKinney on the grounds that the investigative files referred to the records Management Division could be obtained through the U.S. Department of Justice. However, this was not to be the case.

The Debtors' Rule 60 Motion pointed out the error by reminding Judge McKinney of his related decision in

IP89-771-C, to wit; "In the FOIA case the presiding judge made Entry for December 1, 1989, wherein the presiding judge has stated, in part: "In this motion plaintiffs seek to add the Records Management Division of the F.B.I. to this FOIA case against the Department of Justice pursuant to Rule 19. Plaintiffs claim that complete relief cannot be obtained through without such joinder. In response to the motion, the Department of Justice argues that joinder is not necessary in that complete relief can be obtained from the present defendant. Here, the Court agrees and finds that the motion for joinder must be DENIED. As plaintiffs themselves state in their brief, the requests in question seek the same information, so there is no reason why full relief cannot be obtained through

the Department of Justice." SHORT APPENDIX p. 14

Judge McKinney's decision to deny the joinder of the Records Management Division of the F.B.I. and statement that the Debtors could obtain the F.B.I. investigative files possessed by the Records Management Division through the U.S. department of Justice was later proved to be a false and misleading statement of law and fact, infra.

Pursuant to 28 U.S.C. §16.21 and Rule 45(b) F.R.Civ.P. The Debtors filed STATEMENT OF RELEVANCY on 12/12/89, which attached three (3) subpoenas duces tecum served to (1) The U.S. Attorney, (2) The F.B.I. Indianapolis, and (3) The Records Management Division of the F.B.I. Each subpoena duces tecum was served in connection with hearing scheduled for 01/04/90, from which the

Entry for January 17, 1990 was determined. The Statement of Relevancy also attached the Debtors' Schedule B-1 as Exhibit "A", the FOIA Request served to the F.B.I. as Exhibit "B", and a letter dated 09/25/89, to the Debtors from the Records Management Division stating that it possessed 700 pages of investigative files responsive to the respective FOIA Request as Exhibit "C". APPENDIX p. 89-109. The subpoena duces tecum served to the Records Management Division was also the subject of Debtors' APPLICATION FOR LEAVE TO SERVE SUBPOENA DUCES TECUM OUTSIDE THE 100 MILE LIMIT, ("Application"), APPENDIX p. 110-111.

On 12/26/89, the U.S. Attorney filed MOTION TO QUASH SUBPOENAS with accompanying affidavits stating that documents responsive to the subpoenas

served to the F.B.I. and U.S. Attorney were not currently maintained in Indianapolis. APPENDIX P. 112-113

On 12/28/89, the Debtors' filed OBJECTIONS TO MOTION TO QUASH SUBPOENAS, ("Objections"). APPENDIX p. 114-121 The Debtors' Objections pointed out that the U.S. Attorney and F.B.I. had informed the Debtors that documents responsive to the FOIA Requests had been referred to their respective superior components located in Washington D.C. APPENDIX p. 115 The Objections pointed out that the F.B.I. and U.S. Attorney were required by law to preserve copies of all records processed pursuant to the FOIA Requests and that the Motion to Quash constituted an implicit admission that the F.B.I. and U.S. Attorney failed to follow such procedural requirements of law. APPENDIX p. 118-119

At hearing held on 01/04/90, the district court distributed its Entry for January 3, 1990 on Miscellaneous Motions accepting the affidavits submitted by the U.S. Attorney and F.B.I. purporting the inability of the U.S. Attorney and F.B.I. to produce documents responsive to the subpoenas duces tecum because such documents were not located in Indianapolis, while simultaneously denying the Debtors' Application to serve subpoenas duces tecum to the Records Management Division of the F.B.I. APPENDIX P. 122. Neither the Motion to Quash nor the affidavits submitted in support thereof averred that the U.S. Department of Justice was unable to produce the responsive documents, but merely provide that the local components of the U.S. Department of Justice could not locate such

documents. The implication of the Entry for January 3, 1990 on Miscellaneous Motions is simply that the presiding judge knowingly and in a prejudicial manner, falsely misled the Debtors when he stated that the documents responsive to the FOIA Request possessed by the Records Management Division could be obtained through the Department of Justice, supra. It is important to note for the record, that neither Judge McKinney nor the U.S. Department of Justice challenged the relevancy of the evidence sought by the subpoenas duces tecum.

The Rule 60 Motion pointed out the district court's error in failing to require relevant evidence be produced prior to closing the bankruptcy. In short, the Rule 60 Motion stated that "The Entry for January 17, 1990, should

be corrected to establish that by Debtors' due diligence through the government subpoenas duly and timely issued to three (3) components of the Department of Justice, the presiding judge determined to proceed to approve the Application while there existed reasonable grounds for believing that the Department of Justice possessed evidence that would alter the Entry for January 17, 1990, and deny the Application." SHORT APPENDIX p. 16.

The paramount interest of the government is having justice done between the litigants in federal courts militates in favor of requiring a great effort on its part to produce any documents relevant to a fair termination of the litigation even though the government which was served with subpoena duces tecum was a non-party.

Westinghouse Elec. Corp. v. City of Burlington, Vt., 352 F.2d. 762, 122 U.S.App. (D.C. Cir. 1965).

The Department of Justice possessed the documents responsive to the subpoenas duces tecum. Merely because responsive documents to those subpoenas may not have been located at local component offices, that fact unto itself does not relieve the Department of Justice from producing such documents if such are in possession of Department of Justice. Ghandi v. Police Dept. of City of Detroit., 74 F.R.D. 115 (D.C. Mich. 1977).

The district court knew the import and the relevance of the documents possessed by the Department of Justice, but, nonetheless rode roughshod over the Debtors' constitutional due process rights to evidence necessary to

establishment of Debtors' charges of bankruptcy fraud and criminal wrongdoing. Due process has to do with the denial of fundamental fairness, shocking to the universal sense of justice; it deals neither with power nor jurisdiction, but with their exercise. Kinsella v. United States, 361 U.S. 234, 4 L.Ed.2d. 268, 80 S.Ct. 297.

Judge McKinney's implicit finding that the merits in this bankruptcy case have been reached is absurd and frivolous. Instead of requiring the U.S. Department of Justice to produce documents evidencing bankruptcy fraud and other criminal wrongdoing, Judge McKinney chose to blatantly ignore that which was obviously necessary to deciding the merits. The relevant findings of the federal investigation

have never been produced for the record. Judge McKinney's actions in this bankruptcy have effectively seen to that.

Likewise, Judge McKinney's finding that the Debtors have been afforded a reasonable opportunity to litigate the issues in this bankruptcy is equally absurd and frivolous. Absent the relevant findings from the federal investigation, no reasonable person could agree with Judge McKinney's finding. There is a logical, and constitutional due process presumption that the court will find the truth. In this matter, Judge McKinney was wholly disinterested in finding the truth that lay in the 700 pages of investigative files possessed by the U.S. Department of Justice. Stated another way, if the U.S. Department of Justice possessed

evidence that bankruptcy fraud has occurred in this bankruptcy case, justice required that such evidence be produced prior to the closing of the bankruptcy case. Westinghouse Elec. Corp. v. City of Burlington, Vt., supra.

Judge McKinney clearly deprived the debtors of due process and prejudiced their showing of evidence necessary to the establishment of their claim that bankruptcy fraud has occurred. Judge McKinney abused his discretion in ruling that sufficient grounds for disturbing the finality of the Entry for January 17, 1990 were not shown in a timely manner. The record being absent of the relevant findings from the federal investigation concerning the Schedule B-1 Accounts, and Judge Tinder's Notice Regarding Disqualification prove that abuse of discretion is present in the Orders Appealed From.

With regard to the timeliness of the Rule 60 Motion, Judge McKinney again abused his discretion to which no reasonable person could agree. In the Orders Appealed From, the district court denied the Rule 60 Motion "For the same reasons," as denying the Debtors' Motion to Enter, Issue Two, supra. See, Orders Appealed From, SHORT APPENDIX p. 39. The denial of the Rule 60 Motion is illusorily based on the assumption that the Rule 60 Motion is a "Rule 59 Motion." The Rule 60 Motion clearly states that it is brought pursuant to Rule 9024 of the Bankruptcy Rules and Rule 60 F.R.Civ.P. Judge McKinney denied the Rule 60 Motion, in part, on grounds that the Rule 60 Motion was untimely with the finding: "The Seventh Circuit has specifically address this situation and has confirmed that where,

as here, a party does not receive notice of the order and does not file a timely Rule 59(e) motion, the district court is without power to extend time for filing such a motion." (citations omitted). SHORT APPENDIX p. 37. While the Debtors do not dispute that the district court may lack power to extend time for filing a Rule 59(e) F.R.Civ.P. motion, the Debtors strongly dispute Judge McKinney's application of case law to record in construction with the Rule 60 Motion. The Rule 60 Motion is exactly that, a motion filed pursuant to Rule 60 of the Federal Rules of Civil Procedure, not Rule 59(e). No reasonable person could agree with a finding that the Rule 60 Motion is a "Rule 59(e) motion." SHORT APPENDIX p. 11.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN THE MATTER OF:)
)
GEORGE WADE, et al.,) Case No. 90-1852
Debtors-Appellants.)

November 19, 1990

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO DISMISS APPEAL OR ALTERNATIVELY TO AFFIRM JUDGMENT" filed herein on 9/10/90, by Neil E. Shook, Trustee.

2. "DEBTORS-APPELLANTS' BRIEF AND REQUIRED SHORT APPENDIX" filed herein on 10/19/90, by pro se debtors-appellants.

3. "APPELLANTS' APPENDIX PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE" 30(a) filed herein on 10/19/90, by appellants.

As previously ordered by this court, appellants filed their brief in this case as a response to appellees' motion to dismiss or in the alternative to summarily affirm the judgment of the district court. The district court's docket sheet in this case, which is an exhibit in appellants' appendix shows that appellants filed a motion for leave to file late notice of appeal on March 26, 1990. The docket sheet also indicates that the order appellants seek to appeal from was issued on January 17, 1990, however, that order was not entered on the district court docket until February 5, 1990. The district court ruled that because the March 26, 1990 motion was filed 69 days after the January 17, 1990 order, it lacked

jurisdiction to consider whether the appellants had file their appeal late due to excusable neglect under Fed. Rule App. P. 4(a)(5). Rule 4, as well as our case law, indicate that the relevant date for the initial thirty day period in which to file the notice of appeal is the date that an order is entered and not the date of the order. See Alerte v. McGinnis, 898 F.2d. 69 (7th Cir. 1990). Accordingly, IT IS ORDERED that the MOTION TO DISMISS APPEAL OR ALTERNATIVELY TO AFFIRM JUDGMENT is DENIED.

IT IS FURTHER ORDERED that this appeal is REMANDED for the limited purpose of permitting the district court to recompute the time for filing a late

appeal due to excusable neglect and whether appellants' late notice of appeal in this case was acceptable as such. The district court is requested to make its findings by December 20, 1990. Briefing in this appeal shall be held in abeyance pending the district court's action.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN THE MATTER OF:)
)
GEORGE WADE, et al.,) Case No. 90-1854
Debtors-Appellants.)

APPELLANTS' APPENDIX PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 30(a)

October 19, 1990

Note: Portions of record contained in Appellants' Appendix Pursuant to Federal Rule of Appellate Procedure 30(a) ("Appendix") filed 10/19/90 are omitted as unrelated to federal question. Related portions are set forth below-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

The Bankruptcy Of	) Bankr. Ct. No.
ULYSSUS GEORGE and	) IP85-6003(B)
JOYCE WADE, U.G.	) (consolidated)
WADE TRUCKING, INC.,	)
	) Dist. Ct. No.
Debtors.	) IP88-1417-C

NOTICE REGARDING DISQUALIFICATION

(Page 61 of Appendix):

"In determining whether recusal must occur here, I will presume that the nature of the matter investigated by the F.B.I. in consultation with the United States Attorney's office relates to some, if not all, of numerous matters of wrongdoing alleged by the debtors and others in a multitude of pleadings in this bankruptcy proceeding, or in one or more of the many related proceedings.

Broad ranging allegations of bankruptcy fraud and other criminal wrongdoing have been asserted at various time in this proceeding and in related proceedings. These allegations of wrongdoing relate to virtually every aspect of the bankruptcy, including events occurring before the filing of the bankruptcy petitions. These allegations are so comprehensive about matters related to the bankruptcy, it would be inconceivable that these assertions would be unrelated to the matter examined by the F.B.I. In any event, I think it is fair to assume that any matter investigated in connection with this bankruptcy would be related to the issues yet to be decided herein." (Appendix page 61).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

The Bankruptcy Of	)	Bankr. Ct. No.
ULYSSUS GEORGE and	)	IP85-6003(B)
JOYCE WADE, U.G.	)	(consolidated)
WADE TRUCKING, INC.,	)	
	)	Dist. Ct. No.
Debtors.	)	IP88-1417-C

DEBTORS' STATEMENT OF RELEVANCY

(Page 92 of Appendix):

"That based upon the volumn of records [700 pages] possessed by the FBI; the length of the FBI investigation of the debtors' title 11 U.S.C. proceedings; and the implied nature of the investigation [concealment of bankruptcy assets], there exists reasonable grounds for believing that the records possessed by the FBI contain specific information that confirms or evidences the debtors' allegation that Merchants solicited and collected approximately $23,000 in accounts receivable as articulated in paragraph (6) of this statement. Accordingly, if

such information in fact exists and is produced by the FBI per SUBPOENA, the Application by Merchants and the Trustee would be denied by the court on prima facie grounds that Merchants is not entitled to the distribution. Further, any such information would necessarily establish reasonable grounds for believing that Merchants has knowingly and fraudulently filed false claims against the debtors' bankruptcy estate in possible violation of 18 U.S.C. §152 relating to bankruptcy fraud." (Appendix page 92).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN THE MATTER OF:)
)
GEORGE WADE, et al.,) Case No. 90-1854
Debtors-Appellants.)

February 4, 1991

On November 19, 1990, this court remanded this appeal to allow the district court to determine whether the appellants' late filing of their notice of appeal was due to excusable neglect under Federal Rule of Appellate Procedure 4(a)(5). The district court has now found no excusable neglect for the late filing. Accordingly, IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

APPENDIX E

Cady, Richard E. "Bankruptcy Investigation Targets Lawyers, Judges." Indianapolis Star 27 Mar. 1988:1

At least 22 attorneys, two judges, a retired judge and an unknown numbers of bankers are potential targets of a federal investigation focusing on bribes, illegal favors and fraud, according to sources familiar with the investigation.

The investigation, now under the auspices of the Department of Justice's Public Integrity Section, centers on the U.S. Bankruptcy Court here but likely will spill over into other areas, the sources said.

The springboard is evidence provided by Charles M. "Mike" Strange, a former Indianapolis liquidator who worked in numerous courts and for different public agencies.

Strange, 39, is cooperating with investigators under a plea agreement. He is said to have provided detailed information about dozens of incidents dating to the late 1970s, when he took over a family-owned business, the now defunct Midwest Liquidators Inc.

Midwest Liquidators conducted hundreds of auctions and appraisals for the bankruptcy court, other courts, and several other public agencies.

Strange is said to have given investigators documents to support many of his allegations. For other possible cases, Strange has directed investigators to courts, banks and other places for corroborative evidence.

At least 10 of the attorneys are said to be present or former bankruptcy trustees. Many of the other attorneys are reported to specialize in

bankruptcy. Strange allegedly provided money, gifts or services in exchange for getting business.

The judges are believed to include one U.S. district judge and one bankruptcy judge. It is also reliably reported that former Chief Bankruptcy Judge Nicholas W. Sufana, who retired last year, is a target. Sufana has denied any wrongdoing.

Strange reportedly has identified a number of bankers for whom he gave illegal or improper access to auction inventories in exchange for certain favors.

Strange also has described various instances in which he provided other bankers with inflated appraisals of real estate or other property to allow the bankers to loan to favored customers more money than would otherwise be legal.

Strange's unusual relationship with bankers arose because he often conducted auctions of property through estates administered by bank trust departments, sources familiar with the investigation said.

Information and evidence provided by Strange were described as so extensive that part of it will be turned over to U.S. Attorney Deborah Daniels and part of it will be handled by the Public Integrity Section. "We're not at this point involved in that," Daniels said last week.

The investigation is being conducted by the Federal Bureau of Investigation with some support from the Internal Revenue Service. Extra agents have been requested or assigned.

The number of potential criminal cases was said to be more than 50, but

sources familiar with the investigation said this might have to be pared down because of the magnitude.

In some instances, they added, the statute of limitations for criminal prosecution has expired or would expire during the course of the investigation. It is possible disciplinary sanctions will be sought against some people.

Strange pleaded guilty in November to two counts of bankruptcy fraud under an agreement with federal prosecutors.

The agreement says prosecutors will accept five years' probation for Strange on one count and Strange's attorneys can seek a lesser sentence or probation on the second count.

Midwest Liquidators, which was part of a group of companies under Liquidity Limited, Inc., has been in bankruptcy reorganization since 1986.